

No. 78-1796

Supreme Court, U. S.

FILED

JUL 12 1978

MICHAEL GRIFFIN, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

**M. MAURICE GRAHAM AND DAVID GOLDBERG,
PETITIONERS**

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1796

**M. MAURICE GRAHAM AND DAVID GOLDBERG,
PETITIONERS**

v.

UNITED STATES OF AMERICA

***ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT***

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

Petitioners seek review of the decision of the court of appeals dismissing their appeal on the ground that it had already been the subject of an unsuccessful previous appeal.

The pertinent facts are as follows: On August 25, 1964, the government brought an action against petitioners in the United States District Court for the Eastern District of New York, seeking to reduce to judgment the unpaid portion of five tax assessments made against them totalling \$20,111.45. The government claimed that petitioners were liable under 26 U.S.C. 6672 because of their status as responsible officers of Rivoli Trucking Corporation, their closely held corporation (R. 6a-8a).¹

¹"R." refers to the record appendix filed in the court of appeals.

On September 17, 1954, petitioners filed a counterclaim for \$331,626.35 under 28 U.S.C. 1346(b) (the Federal Tort Claims Act). The counterclaim alleged that they were injured because the Federal Maritime Board negligently caused Rivoli Trucking Corporation to pay pier operators for the loading and unloading of the trucks of Rivoli (R. 2a, 13a-18a).

The district court granted summary judgment for the government on its tax claim, finding that petitioners willfully failed to pay over to the United States the taxes they withheld as responsible officers of Rivoli Trucking Corporation (R. 19a-31a). The court dismissed petitioners' counterclaim. After describing the history of petitioners' unsuccessful previous attempts to litigate their claim for damages, the district court found that petitioners failed to state a claim upon which relief could be granted and that, at all events, the statute of limitations had expired (R. 24a-30a). Although petitioners filed a notice of appeal from this decision, the court of appeals dismissed the appeal for failure to prosecute (R. 3a, 32a-33a).

In 1975, petitioners filed a motion in the district court under Fed. R. Civ. P. 60(b), for relief from the 1966 judgment. On April 14, 1976, the district court denied the motion (R. 32a-35a). Petitioners' appeal was dismissed by the court of appeals (R. 3a-4a).

In late May 1978, petitioners filed another motion for relief from the 1966 judgment. In an order dated November 20, 1978, the district court denied the motion for the same reasons it denied the previous motion more than two years earlier on April 14, 1976 (R. 4a, 50a). On January 9, 1979, petitioners filed a notice of appeal from this order (R. 4a). On May 9, 1979, the court of appeals

dismissed the appeal on the ground that the subject of the appeal was identical to that of the unsuccessful previous appeal (Pet. App. 1a-2a).

The court of appeals correctly dismissed the appeal. As this Court observed in *Thompson v. Maxwell Land Grant Co.*, 168 U.S. 451, 456 (1897), "[i]t is the settled law of this court * * * that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit." See also *Burnside v. Eastern Airlines, Inc.*, 519 F. 2d 1127 (5th Cir. 1975).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JULY 1979